No. 24-_____

In the
# Supreme Court of the United States

AUSTIN KYLE LEE,

*Petitioner*,

v.

UNITED STATES,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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September 27, 2024

## QUESTIONS PRESENTED

Petitioner Austin Lee was sentenced for drug offenses based on a statutory enhancement, revised under the First Step Act of 2018, for defendants with a prior conviction for a "serious drug felony." Despite the government's request that three factual predicates for the enhancement be submitted to a jury, the district court made the necessary factual findings itself. On appeal, the government conceded error under *Apprendi*. But the court of appeals nevertheless affirmed, concluding that any error in the district court's treatment of two of the factual predicates was "harmless" under *Neder v. United States*, 527 U.S. 1 (1999), and that the third predicate fell within a narrow exception to *Apprendi* under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The questions presented are as follows:

1. Whether, as several circuits have held, all *Apprendi* violations should be treated as trial errors and subject to the harmless-error test from *Neder v. United States*, 527 U.S. 1 (1999), or, as the Third Circuit has held, at least some *Apprendi* errors should be treated as sentencing errors and evaluated under the harmless-error test from *Parker v. Dugger*, 498 U.S. 308 (1991).

2. Whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be overruled.

## PARTIES TO THE PROCEEDING

Petitioner is Austin Kyle Lee (appellant below).

Respondent is the Unites States (appellee below).

## STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

- Fourth Circuit: *United States v. Lee*, No. 21-4299 (4th Cir. 2024) (reported at 100 F.4th 484)
- United States District Court for the Eastern District of North Carolina: *United States v. Lee*, No. 7:18-CR-153-1FL (E.D.N.C. June 14, 2021) (not reported)

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## INTRODUCTION

This case presents two important questions concerning the contours of the *Apprendi* doctrine that warrant this Court's review.

First, the harmlessness standard. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that facts increasing a criminal sentence must be found by a jury beyond a reasonable doubt under the Sixth Amendment. It has repeatedly confirmed that holding and clarified its scope in cases since. In *Washington v. Recuenco*, 548 U.S. 212 (2006), the Court held that an *Apprendi* error could be excused on appeal if "harmless." But the Court has yet to decide *how* lower courts should assess harmlessness in the context of an *Apprendi* error.

The courts of appeals have confronted this issue with considerable frequency and adopted one of two conflicting standards. Several circuits—including the Fourth Circuit—have held that all such errors must be judged under the harmlessness standard set forth in *Neder v. United States*, 527 U.S. 1, 18 (1999), which asks whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *See* App.10a-11a; *United States v. Legins*, 34 F.4th 304, 323 (4th Cir. 2022). But the Third Circuit, sitting *en banc*, has held that *Neder* does not invariably apply. *See United States v. Lewis*, 802 F.3d 449, 458 (2015) (en banc). In the Third Circuit, when *Apprendi* errors infect only sentencing, courts apply a different harmlessness test under *Parker v. Dugger*, 498 U.S. 308, 319 (1991), which asks whether correcting the error "would have made no difference to the sentence."

Guidance from this Court is needed to resolve this conflict. The circuit split is deep and enduring, and the circuits are well entrenched in their positions. This case, in which the court of appeals assumed Sixth Amendment violations during sentencing but held they were harmless, offers the ideal opportunity for this Court to eliminate any confusion in this important area of constitutional jurisprudence.

Second, the exception to *Apprendi* for the fact of a prior conviction. In *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998), this Court held that a judge may make findings as to the fact of a defendant's prior conviction, consistent with the Sixth Amendment, even when that fact increases the defendant's sentence. Since *Apprendi* was decided two years later, *Almendarez-Torres* has invited a steady stream of criticism and confusion. Indeed, *Apprendi* itself characterized it as an "exceptional departure from historic practice," "arguabl[y] . . . incorrectly decided," and inconsistent with "a logical application of our reasoning." *Id.* at 487, 489-90.

The time has come for *Almendarez-Torres* to be overruled. As members of this Court have made clear over the past two-and-a-half decades, there is no basis for allowing that case to live on as an exception to *Apprendi*. *Almendarez-Torres* was wrong when it was decided, and this Court's subsequent decisions have refuted the erroneous analyses upon which its ruling was based. Left uncorrected, this unjustifiable anomaly in the Court's *Apprendi* jurisprudence will continue to deprive countless criminal defendants of the full constitutional protections to which they are

entitled and will continue to confound lower courts and litigants alike.

## OPINIONS BELOW

The court of appeals' opinion is reported at 100 F.4th 484 and reproduced at App.1a-12a. The opinion of the district court (not reported) is reproduced at App.13a-29a.

## JURISDICTION

The court of appeals entered its judgment on April 30, 2024. On July 23, 2024, Chief Justice Roberts extended the time for filing a petition for writ of certiorari until September 27, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the Appendix.

## STATEMENT OF THE CASE

1. In December 2019, Mr. Lee was charged in a superseding indictment with seven drug-related offenses. App.2a-3a. The charges included conspiracy to distribute certain quantities of controlled substances under 21 U.S.C. §§ 841(a)(1) and 846, and possession with intent to distribute under 21 U.S.C. § 841(a)(1). App.2a-3a. Given the drug weights at issue, the conspiracy carried a mandatory minimum sentence of ten years' imprisonment and a statutory maximum of life under Section 841(b)(1)(A), and the possession carried a mandatory minimum of five years' imprisonment and a statutory maximum of forty years under Section 841(b)(1)(B). App.4a.

Those same provisions increase the applicable mandatory minimum sentences for offenders with certain prior convictions. 21 U.S.C. § 841(b)(1)(A), (B). Historically, the government could seek those enhanced penalties under Section 841(b)(1)(A) and (B) if a defendant had a prior conviction for a "felony drug offense." *See* First Step Act, Pub. L. No. 115-391, § 401, 132 Stat. 5194, 5220 (2018) (striking "felony drug offense" from 21 U.S.C. § 841(b)(1)(A)). The term "felony drug offense" referred—quite simply—to any drug offense punishable by imprisonment for more than one year. *See* 21 U.S.C. § 802(44) (2016).

But with the First Step Act of 2018, Congress rendered the Section 841(b)(1)(A) and (B) enhancements considerably more complex by replacing "felony drug offense" with "serious drug felony." *See* Pub. L. No. 115-391, § 401, 132 Stat. at 5220. A "serious drug felony" is "an offense described in Section 924(e)(2) of Title 18 . . . for which . . . the offender served a term of imprisonment of more than 12 months . . . [and] the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense." *Id.* The offenses described under Section 924(e)(2) include drug offenses punishable by "a maximum term of imprisonment of ten years or more" under state or federal law, as well as violent felonies. 18 U.S.C. § 924(e)(2)(A).

Under the First Step Act, then, the government may seek the increased mandatory minimum sentence for Section 841(b)(1)(A) or (B) only after proving three facts: (1) the defendant has a prior conviction of either a serious drug offense punishable by at least ten years

in prison or a violent felony; (2) the defendant actually served more than 12 months in prison for the prior conviction; and (3) the defendant commenced the instant offense within 15 years of release from imprisonment for the prior conviction. 21 U.S.C. § 802(57); *see United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 1237 (2020); App.3a-4a.

Section 851 sets forth the procedure for establishing such a prior conviction under Section 841(b)(1)(A) or (B). The government must file notice with the court of its intent to rely on the defendant's prior conviction. 21 U.S.C. § 851(a)(1). If the government files a notice, the court must, "after conviction but before pronouncement of sentence[,] inquire . . . whether [the defendant] affirms or denies that he [or she] has been previously convicted as alleged" in the government's notice. 21 U.S.C. § 851(b). If the defendant denies the prior conviction and files a written response, the court must hold a hearing "without a jury." 21 U.S.C. § 851(c)(1). At the hearing, "either party may introduce evidence," but the government bears "the burden of proof beyond a reasonable doubt on any issue of fact," and the court must enter "findings of fact and conclusions of law" at the request of either party. 21 U.S.C. § 851(c)(1). The court must sentence the defendant to the enhanced penalty if it determines that the fact of prior conviction subjects the defendant to increased punishment. 21 U.S.C. § 851(d)(1).

Here, the government sought the increased mandatory minimum sentences under Section 841(b)(1)(A) and (B) on Mr. Lee due to a prior drug conviction.

App.3a, 14a. In accordance with Section 851(a)(1), the government filed notice of its intent to use Mr. Lee's prior conviction to increase the mandatory minimum sentences (the "Notice"). App.5a, 14a-15a; CA4.App.78-80. The government attached to the Notice a certificate of disposition, which showed that on July 11, 2011, Mr. Lee pleaded guilty to criminal sale of a controlled substance in the second degree, in violation of New York Penal Law § 220.41. App.5a-6a; CA4.App.81. Although the New York County Supreme Court sentenced Mr. Lee to six years' imprisonment, App.6a; CA4.App.81, the government averred that the offense of prior conviction carried a statutory maximum sentence of at least ten years. App.5a; CA4.App.74-76. A certificate of incarceration appended to the Notice stated that Mr. Lee was incarcerated from January 1, 2011, to December 23, 2015, a period of nearly five years. App.6a; CA4.App.82.

The same day it filed the Notice, the government also filed proposed jury instructions and a proposed verdict form. App.15a-16a; CA4.App.109-202. In both documents, the government asked the district court to submit to the jury the factual questions necessary to find that Mr. Lee's prior drug conviction subjected him to the increased mandatory minimum sentences under Section 841(b)(1)(A) and (B). App.15a-16a; CA4.App.161-62, 172-73, 200-01. Mr. Lee joined the government in its request for the jury to decide these facts about his prior conviction. App.5a-6a, 16a; CA4.App.547.

2. The district court rejected the parties' request, concluding that it could permissibly resolve all aspects

of the "serious drug felony" analysis without jury involvement. App.6a, 22a-29a; CA4.App.790. The jury found Mr. Lee guilty on all counts in the superseding indictment. After the jury trial completed, the district court conducted a Section 851(c) hearing on whether Mr. Lee's prior conviction subjected him to increased mandatory minimum sentences with respect to the relevant counts. App.7a; CA4.App.978-87.

At the hearing, Mr. Lee argued that his New York conviction had been vacated based on a motion he filed in state court in July 2020. App.7a; CA4.App.984-85. But the district court credited three documents proffered by the government—the New York certificate of conviction, the New York certificate of incarceration, and the superseding indictment in this case—and found that Mr. Lee's prior conviction constituted a serious drug felony under Sections 802(57) and 841(b)(1)(A) and (B). App.7a–8a; CA4.App.990, 992–93.

As a result, the district court imposed a total sentence of 340 months' imprisonment, which included a concurrent sentence of 280 months' imprisonment on the conspiracy and possession counts. App.8a, 34a. At the sentencing hearing, the district court made clear that it fashioned a sentence within the statutory minimum and maximum terms of imprisonment after applying the enhanced penalty under Section 841(b)(1)(A) and (B). CA4.App.997.

3. On appeal, the government conceded that the district court's failure to submit the factual elements of the "serious drug felony" sentencing enhancement to the jury violated Mr. Lee's Sixth Amendment rights. App.10a. The parties' dispute thus focused on whether

the district court's constitutional error was harmless. *Id.*

Applying the test for harmless-error review from *Neder*, the court of appeals explained that "[w]hen a district court fails to submit a sentencing factor to the jury," in violation of *Apprendi*, the error is harmless if "proof of the missing element is 'overwhelming' and 'uncontroverted.'" *Id.* The court of appeals held that two of the three elements of the "serious drug felony" sentencing enhancement were both "uncontested" by Mr. Lee and "supported by overwhelming evidence" introduced at trial: namely, Mr. Lee had served more than 12 months in prison for his prior offense and the instant offenses commenced within 15 years of his release from prison. App.10a-11a. The court of appeals thus held that the district court's error as to these first two elements was harmless. *Id.*

The court of appeals did not conclude that the third element—that Mr. Lee had a prior conviction for an offense described in Section 924(e)(2)—was both "uncontested" and "supported by overwhelming evidence" as *Neder* would have required. App.11a. To the contrary, it acknowledged that Mr. Lee argued during his Section 851 hearing that the element was not satisfied because his prior conviction had been vacated. App.7a, 11a. But the court concluded that Mr. Lee's evidence addressed "the fact of his prior conviction," which "the judge may decide so long as *Almendarez-Torres* remains good law." App.11a. Thus, based on the *Almendarez-Torres* "prior conviction" exception to *Apprendi*, the court held that the district judge's factfinding was not a constitutional error with respect to this third element. *Id.*

## REASONS FOR GRANTING THE PETITION

This case squarely presents two vitally important questions to the constitutional rights of criminal defendants recognized by this Court in *Apprendi* and its progeny. Only this Court can resolve the circuits' disagreement on the standard for determining when such errors warrant any judicial relief. And only this Court can overrule its erroneous and increasingly anomalous ruling in *Almendarez-Torres*. Until the Court takes action, criminal defendants will continue to be deprived of the full rights that the Sixth Amendment affords them.

### I. The Court Should Resolve the Circuit Split on the Harmlessness Standard for *Apprendi* Errors.

This Court should resolve how to determine whether constitutional error under *Apprendi* was harmless. Without this Court's guidance, the courts of appeals are divided. Several courts of appeals, including the one below, treat all such errors as "trial errors" subject to harmless-error review under *Neder*. But the Third Circuit employs a different mode of analysis for *Apprendi* errors that go to sentencing, reviewing such errors for harmlessness not under *Neder*, but *Parker v. Dugger*, 498 U.S. 308 (1991). This question is important and recurring. And this case presents an ideal vehicle to resolve the conflict.

#### A. The Circuits Are Divided on How to Determine Whether an *Apprendi* Error Is Harmless.

1. In addition to the court of appeals below, at least four other circuits (the Sixth, Eighth, Ninth, and Eleventh) apply *Neder*'s harmless-error test to all

*Apprendi* errors, treating them as trial errors that may be deemed harmless when it is clear "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18.

In *United States v. Carr*, 761 F.3d 1068 (9th Cir. 2014), for instance, a jury convicted two defendants of using and carrying a firearm to commit a crime of violence under 18 U.S.C. § 924(c)(1)(A). *Carr*, 761 F.3d at 1082. But the jury made no findings about whether either defendant discharged his firearm. *Id.* At sentencing, the district court found that each had discharged his firearm and was therefore subject to an enhanced mandatory minimum sentence. *Id.* The government conceded the district court violated the Sixth Amendment in doing so, but it argued the error was harmless. *Id.* Applying *Neder*, the Ninth Circuit agreed. The court determined that based on the evidence at trial, there was "no reasonable probability that the jury would have acquitted [them] of discharging a firearm." *Id.* (citing *Neder*, 527 U.S. at 17).

The Sixth Circuit took the same approach when faced with an *Apprendi* error in *United States v. Copeland*, 321 F.3d 582 (6th Cir. 2008). There, a jury convicted a defendant of conspiracy to distribute controlled substances under 21 U.S.C. §§ 846 and 841(a). *Copeland*, 321 F.3d at 589-90. But the indictment did not specify a drug quantity, and that question was not submitted to the jury. *Id.* at 603-04. The district court imposed a sentence above the default statutory maximum, finding the defendant conspired to distribute a quantity of drugs triggering

enhanced penalties. *Id.* at 605. On appeal, the Sixth Circuit found the district court committed a "quintessential *Apprendi* violation" by considering facts "that should have been submitted to the jury." *Id.* Nonetheless, the court of appeals held the error was harmless under *Neder*'s framework because the government offered "overwhelming" and "uncontroverted" evidence at trial that the defendant conspired to distribute a sufficient quantity of drugs to justify the enhanced sentence. *Id.* at 603, 606.

In nearly identical circumstances, the Eighth and Eleventh Circuits likewise invoked *Neder* to uphold sentences imposed following improper drug-weight factfinding by the district court. *See United States v. Anderson*, 236 F.3d 427, 428-30 (8th Cir. 2001) (finding *Apprendi* error harmless under *Neder* due to "overwhelming evidence" at trial of sufficient drug quantity to justify enhanced sentence); *United States v. Nealy*, 232 F.3d 825, 828-30 (11th Cir. 2000) (excusing *Apprendi* error under *Neder* "given the undisputed evidence about drug quantity" at trial).

Several other circuits employ a similar harmless-error analysis for *Apprendi* errors, though without express reliance on *Neder*. *See United States v. Harakaly*, 734 F.3d 88, 95-97 (1st Cir. 2013) (concluding district court committed error by imposing enhanced sentence based on drug-quantity findings not admitted by the defendant or found by a jury beyond a reasonable doubt, but determining error was harmless "[b]ecause the evidence of the triggering drug quantity was overwhelming"); *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 208 (D.C. Cir. 2013) (deeming harmless any *Apprendi* error district

court committed in failing to instruct jury to determine quantity of drugs attributable to the defendant individually as opposed to the conspiracy as a whole where trial evidence left "no doubt" the jury would have made the necessary determination); *United States v. Hollingsworth*, 495 F.3d 795, 806 (7th Cir. 2007) (similar).

2. The court of appeals below followed suit. Assuming Mr. Lee suffered a Sixth Amendment violation here, the court held that such a "constitutional error—like most trial errors—is subject to harmless error review." App.10a (citing *Neder*, 527 U.S. at 7). And under "that standard," the court continued, "we will disregard the error only if 'proof of the missing element is overwhelming and uncontroverted.'" *Id.* (quoting *United States v. Legins*, 34 F.4th 304, 322 (4th Cir. 2022)).

In doing so, the court of appeals relied on its prior holding in *Legins*. There, the Fourth Circuit expressly considered whether to analyze an *Apprendi* error as a "trial error" or as a "sentencing error." 34 F.4th at 319. The court looked to this Court's decision in *Recuenco*, which held that *Apprendi* errors can be considered harmless. 548 U.S. at 215. And though the Fourth Circuit acknowledged that this "top-line holding does not . . . resolve *how* to perform the harmless-error analysis," it concluded that the "Government's failure to include a sentence-enhancing factor in the indictment and jury charge should be treated exactly like its failure to include any other element of an offense." *Legins*, 34 F.4th at 321. "And the proper way to perform harmless-error analysis in both cases is to ask whether proof of the missing element is

'overwhelming' and 'uncontroverted.'" *Id.* (quoting *Neder*, 527 U.S. at 17-18).

3. The Third Circuit takes a different view. In *United States v. Lewis*, 802 F.3d 449 (3d Cir. 2015) (en banc), the Third Circuit held that while some *Apprendi* errors may be treated as trial errors, others should be treated as sentencing errors. *Lewis*, 802, F.3d at 456. A sentencing error is harmless only where it "would have made no difference to the sentence." *Parker*, 498 U.S. at 319.

In *Lewis*, a jury convicted a defendant of using or carrying a firearm during a crime of violence under 18 U.S.C. § 924(c)(1)(A). *Lewis*, 802, F.3d at 451-52. At sentencing, the district court determined the defendant also brandished the firearm and so applied an enhanced mandatory minimum under Section 924(c)(1)(A)(ii), despite no brandishing allegation in the indictment and no brandishing finding by the jury. *Id.* at 451-52. On appeal, the government conceded error but argued the error was harmless based on the evidence adduced at trial. *Id.* at 453. A divided panel of the Third Circuit agreed with the government, treating the *Apprendi* error as a trial error subject to *Neder*'s harmless-error standard and finding that standard satisfied. *United States v. Lewis*, 766 F.3d 255, 271 (3d Cir. 2014), *rev'd en banc*, 802 F.3d 449 (3d Cir. 2015).

On rehearing *en banc*, however, the full court reversed course. The court began by distinguishing between trial errors and sentencing errors. *Lewis*, 802 F.3d at 455. The former category, the court explained, comprises deficiencies in the indictment or the jury instructions—such as a district court's failure to

submit to the jury an essential element of an offense for which the defendant was tried and convicted—and is subject to harmless-error review under *Neder*. *Id.* Sentencing errors, on the other hand, involve defects in the sentencing phase—such as a district court's imposing a sentence beyond the prescribed statutory maximum or sentencing a defendant for a crime other than the one for which he was convicted—and are reviewed for harmlessness using a different standard set out in *Parker*. *Id.* Under that standard, a reviewing court asks only whether the error "made [a] difference to the sentence." *Id.* at 456 (quoting *Parker*, 498 U.S. at 319). If it did, the error was not harmless. *Id.*

The Third Circuit held that *Apprendi* errors that affect a defendant's sentence should be analyzed under the *Parker* standard. Resorting to the trial record in this context, the Third Circuit stressed, "would run directly contrary to the essence of *Apprendi*":

> The motivating principle behind *Apprendi* and *Alleyne* [*v. United States*, 570 U.S. 99 (2013)] is that judges must not decide facts that change the mandatory maximum or minimum; juries must do so. If we affirm because the evidence is overwhelming, then we are performing the very task that *Apprendi* and *Alleyne* instruct judges not to perform.

*Id.*

Turning to the facts before it, the Third Circuit concluded the district court committed a sentencing error by sentencing the defendant for an offense different from the one for which he was convicted. *Id.*

at 455. Thus, the court applied *Parker*'s harmless-error framework and asked only whether the defendant's sentence would have been different absent the *Apprendi* error. *Id.* at 458. Given the error resulted in the defendant's receiving "an extra two years" of imprisonment, the court answered in the affirmative and held the error was not harmless. *Id.*

The Third Circuit's approach in distinguishing between trial errors and sentencing errors in the harmless-error inquiry conflicts with the approach taken by other circuits, which treats all *Apprendi* errors as trial errors subject to review under *Neder*. The Fourth Circuit explicitly acknowledged this split in *Legins*. *See* 34 F.4th at 322. So too have criminal law experts: "courts are divided on how harmlessness [of an *Alleyne* error] should be assessed." 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.6(d) n.168 (4th ed. December 2023 update) (contrasting *Lewis* with other cases). This Court's intervention is needed to resolve it.

### B. This Case Would Have Been Resolved Differently under the Third Circuit's Standard.

Had Mr. Lee been convicted in the Third Circuit, rather than the Fourth, the outcome of his appeal would have been different. *Lewis* directs courts to treat an *Apprendi* error as a "sentencing error," so long as "nothing was wrong with [the] indictment or trial." *Lewis*, 802 F.3d at 455. In that case, the defendant was properly indicted for an offense and found guilty of that offense by a properly instructed jury; thus, "Lewis was properly convicted of that offense." *Id.* But the sentencing judge found additional facts and applied a

different sentence. *Id.* "As in *Alleyne*, this was the error." *Id.*

It was also the error here. Mr. Lee does not challenge his conviction for the underlying drug offenses. He does not argue that the indictment omitted elements of those offenses, or that the jury was improperly instructed. What Mr. Lee challenges—like the defendants in both *Lewis* and *Alleyne*—is the application of a sentence based on enhancements, the underlying facts of which the jury never found. Under *Lewis*, that is a sentencing error, not a trial error.

As *Lewis* further explains, "harmless-error review for a sentencing error requires a determination of whether the error 'would have made no difference to the sentence.'" *Id.* at 456 (quoting *Parker*, 498 U.S. at 319). The error here added five years to the mandatory minimum facing Mr. Lee. App.4a. It is therefore impossible to say that this error "would have made no difference" to his sentence. Under *Lewis*, Mr. Lee's sentence would have been vacated.*

"There is a further reason" why courts should look to the impact of an *Apprendi* error on the sentence

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* To be sure, *Lewis* recognizes circumstances in which an *Apprendi* "sentencing error . . . is inextricably intertwined with a trial error" and suggests such hybrid errors should be analyzed under the *Neder* test. *Lewis*, 802 F.3d at 455. This is not such a case, however, as Mr. Lee was validly indicted, tried, and convicted for the underlying drug offenses and then sentenced based on an enhancement supported only by judicial factfinding. To the extent *Lewis*'s recognition of "intertwined" errors casts any doubt on the correct standard to apply, moreover, that only further underscores the need for this Court's review and guidance.

rather than "back to the trial record" under such circumstances: "Looking back to the trial record would run directly contrary to the essence of *Apprendi* and *Alleyne*." *Lewis*, 802 F.3d at 456. The "motivating principle" behind those cases "is that judges must not decide facts that change the mandatory maximum or minimum; juries must do so." *Id.* "If we affirm because the evidence is overwhelming, then we are performing the very task that *Apprendi* and *Alleyne* instruct judges not to perform." *Id.*

Indeed, even the Fourth Circuit "acknowledge[s] that there is something deeply unsatisfying about this result":

> [I]t is bizarre that a deprivation of the jury right, which reflects a distrust of judges to adjudicate criminal guilt, can be set aside as harmless when we judges find the result sufficiently clear. It creates an inescapable irony, "in which the remedy for a constitutional violation by a trial judge . . . is a repetition of the same constitutional violation by the appellate court . . . ."

*Legins*, 34 F.4th at 323 (citation omitted).

The error at Mr. Lee's sentencing led to an increase in the mandatory minimum on the conspiracy and possession. In the Third Circuit, that error would have been analyzed as what it was—an error at sentencing—and Mr. Lee's sentence would have been vacated.

### C. The Question Is Important and This Case Offers an Ideal Vehicle to Resolve It.

The standard for determining the harmlessness of *Apprendi* errors is a vitally important question. The question frequently arises in this context. And as it did here, it often decides whether a defendant will receive judicial relief for a constitutional violation.

Errors under *Apprendi* are unlikely to dissipate any time soon. Indeed, this case demonstrates the lingering confusion when it comes to drawing proper Sixth Amendment boundaries: in passing the First Step Act, Congress deemed it permissible to assign a factfinding role to the judge. The government disagreed below. The district court then disagreed with the government. *See also United States v. Delpriore*, 662 F. Supp. 3d 1021, 1027 (D. Alaska 2023) (cataloging differing opinions on whether the First Step Act's factual predicates may be decided by a judge). And the court of appeals assumed error without deciding. Plainly, errors under *Apprendi* will continue to occur, making the question of how to remedy them all the more crucial to resolve.

This case presents an ideal opportunity for this Court to do so. To begin, the issue is squarely and cleanly presented. Mr. Lee has raised and preserved the *Apprendi* errors at every material stage in this litigation. And the government concedes that such an error occurred. Accordingly, the only issue before this Court is the proper framework for analyzing whether that error was harmless where it had an impact on Mr. Lee's sentence.

Moreover, this Court's guidance will have a material effect on the proceedings. The court of appeals' harmlessness determination relied exclusively on the *Neder* framework. *See* App.10a-11a. Should Mr. Lee prevail on his argument that such reliance on *Neder* was inappropriate here, the court of appeals on remand would have to conduct a new harmless-error analysis using the standard articulated by this Court. Application of that standard could well lead to a determination that the *Apprendi* error was not harmless, thus requiring vacatur of Mr. Lee's sentence.

## II. The Court Should Reconsider *Almendarez-Torres*.

This Court should also grant certiorari to decide whether *Almendarez-Torres* should be overruled as inconsistent with the Sixth Amendment jury right.

*Apprendi* and its progeny explain that under the Sixth Amendment, "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" must be found by a unanimous jury "beyond a reasonable doubt." *Alleyne*, 570 U.S. at 111 (citing *Apprendi*, 530 U.S. at 490). A straightforward application of this rule would dictate that when the fact of a defendant's prior conviction can be used to enhance the defendant's sentence (*see, e.g.*, 21 U.S.C. § 841(b)(1)(A), (B)), that fact must also be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 489–90. But in *Almendarez-Torres*, the Court ruled (by a 5-4 majority) that the fact of a prior conviction need not be proven to a jury by a reasonable doubt before enhancing a defendant's sentence for a subsequent crime. *Almendarez-Torres*, 523 U.S. at

247. The Court in *Apprendi* made clear that *Almendarez-Torres* was an "exceptional departure from historic practice," "arguabl[y] . . . incorrectly decided," and inconsistent with "a logical application of our reasoning." *Apprendi*, 530 U.S. at 487, 489-90. Yet, because the *Apprendi* petitioner did not challenge *Almendarez-Torres*, the Court preserved its ruling as a "narrow exception" to the *Apprendi* rule. *Id.* at 490.

The Court should take this opportunity to close the *Almendarez-Torres* loophole to *Apprendi*. *Almendarez-Torres* was wrong when it was decided, and this Court's precedents interpreting the *Apprendi* rule have eroded and explicitly criticized the *Almendarez-Torres* decision since it was issued. As long as this Court declines to revisit this unjustified exception to *Apprendi*, countless criminal defendants will be unconstitutionally sentenced. The Court should wait no longer to grant certiorari to overrule *Almendarez-Torres*.

### A. *Almendarez-Torres* Was Wrongly Decided and Has Been Further Undermined by Subsequent Decisions.

*Almendarez-Torres* is not just an anomalous departure from this Court's *Apprendi* jurisprudence; the key analyses and precedents upon which the decision relied have each been refuted and overruled. It is no wonder then that this Court's subsequent decisions have repeatedly questioned the continued viability of the decision and called for it to be revisited.

1. *Almendarez-Torres* based its reasoning on the premise that sentencing factors were distinct from a crime's elements and that only the latter needed to be included in the indictment and proved to the jury.

*Almendarez-Torres*, 523 U.S. at 228, 239. Because recidivism was a "traditional" sentencing factor, the *Almendarez-Torres* Court held, it was not subject to these constitutional requirements. *Id.* at 230, 241, 243-44, 247.

In short order, this Court's subsequent decisions refuted that analysis, holding that any perceived distinction between sentencing factors and elements did not determine whether a fact must be decided by a jury. *See Ring v. Arizona*, 536 U.S. 584, 604-05 (2002) ("*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question of 'who decides,' judge or jury."); *Apprendi*, 530 U.S. at 478 ("Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding.").

Consistent with this historical practice, *Apprendi* and its progeny established that "'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime" that must be found by a jury "beyond a reasonable doubt." *Alleyne*, 570 U.S. at 111 (quoting *Apprendi*, 530 U.S. at 490). As observed by Justice Thomas—the critical fifth vote in the slim *Almendarez-Torres* majority—"one of the chief errors of *Almendarez-Torres*" was its "attempt to discern" whether a fact could be characterized as a "sentencing factor" or "element" rather than analyzing whether the fact increases a defendant's sentencing range. *Apprendi*, 530 U.S. at

521 (Thomas, J., concurring). Indeed, the Court has since overruled the basis for the distinction between sentencing factors and elements, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), as inconsistent with "the principle applied in *Apprendi*." *Alleyne*, 570 U.S. at 105-07, 111-16; *see also id.* at 118 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., concurring) (observing that "the opinion of the Court . . . explains why [*Harris*] and [*McMillan*] were wrongly decided"); *United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (plurality op.) (recognizing that the Court in *Alleyne* "expressly overruled" *McMillan*).

The other precedents supporting the *Almendarez-Torres* exception have fared no better. The *Almendarez-Torres* Court also based its ruling on three cases holding that judges, as opposed to juries, can "determine the existence of factors that can make a defendant eligible for the death penalty." *See Almendarez-Torres*, 523 U.S. at 247 (citing *Walton v. Arizona*, 497 U.S. 639 (1999); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 (1984)). This Court has since overruled each of those cases as irreconcilable with *Apprendi*. *See Ring*, 536 U.S. at 588 (overruling *Walton*); *Hurst v. Florida*, 577 U.S. 92, 101 (2016) (overruling *Spaziano* and *Hildwin*).

Finally, *Almendarez-Torres* also relied on a flawed understanding that "recidivism" was "a traditional . . . basis for a sentencing court's increasing an offender's sentence." *Almendarez-Torres*, 523 U.S. at 243. The majority asserted it "found no statute that clearly makes recidivism an offense element." *Id.* at 230; *see also id.* at 243-44. But the four dissenting justices had

no trouble identifying "many such" statutes that include recidivism as an element of the offense. *Id.* at 261-62 (Scalia, J., dissenting). The dissent further clarified that the "rule at common law," as well as the "near-uniform practice among the States," was that a "prior conviction is 'typically' treated . . . as an element of a separate offense." *Id.* at 261 (Scalia, J., dissenting). Accordingly, "[a]t common law, the fact of prior convictions had to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime." *Id.*

2. Unsurprisingly, this Court has repeatedly criticized *Almendarez-Torres* and questioned its continued viability. The Court in *Apprendi* asserted that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application" of the reasoning in *Apprendi* "should apply if the recidivist issue were contested." *Apprendi,* 530 U.S. at 489-90. *Apprendi* further cast *Almendarez-Torres* as "at best an exceptional departure" from "historic practice" and at odds with the "uniform course of decision during the entire history of our jurisprudence." *Id.* at 487, 490. The Court has echoed these criticisms in its more recent decisions. *See, e.g.*, *Pereida v. Wilkinson*, 592 U.S. 224, 238 (2021) ("'[T]he fact of a prior conviction' supplies an unusual and 'arguable' exception to the Sixth Amendment rule in criminal cases that 'any fact that increases the penalty for a crime' must be proved to a jury rather than a judge." (quoting *Apprendi*, 530 U.S. at 490)).

A number of Justices have also issued separate opinions criticizing *Almendarez-Torres* and even

expressly calling for it to be overturned. *See, e.g.*, *Erlinger v. United States*, 144 S. Ct. 1840, 1861 (2024) (Thomas, J., concurring) ("I continue to adhere to my view that we should revisit *Almendarez-Torres* and correct the error to which I succumbed by joining that decision." (internal quotation marks omitted)); *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006) (Thomas, J., dissenting from denial of certiorari) (stating that "[i]t is time for this Court to do its part"); *Rangel-Reyes*, 547 U.S. 1200 (Stevens, J., concurring in denial of certiorari) ("I continue to believe that *Almendarez-Torres* . . . was wrongly decided . . . ."); *Ring*, 536 U.S. at 619 (O'Connor, J., dissenting) ("*Apprendi*'s rule . . . directly contradicts . . . *Almendarez-Torres*."); *Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., joined by Souter and Ginsburg, JJ., dissenting) ("[T]he Court's holding in *Almendarez-Torres* . . . was in my view a grave constitutional error affecting the most fundamental of rights . . . .").

### B. *Stare Decisis* Does Not Support Adhering to *Almendarez-Torres*.

*Stare decicis* principles cannot save *Almendarez-Torres*. "*Stare decisis* is not an 'inexorable command'" to adhere to flawed precedent, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2270 (2024) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)), and the doctrine is "at its weakest when [this Court] interpret[s] the Constitution," *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020) (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). It does not "compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law."

*Alleyne*, 570 U.S. at 119 (Sotomayor, Ginsburg, & Kagan, JJ., concurring) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). When revisiting a precedent, this Court considers "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos*, 590 U.S. at 106. Each of these factors supports overruling *Almendarez-Torres*.

1. As explained above, *see* Part II.A, *supra,* the reasoning of *Almendarez-Torres* is flawed, and members of this Court have continuously criticized it. From the very start, four Justices dissented in *Almendarez-Torres* on the ground that it is "genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence . . . a fact that increases the maximum penalty to which a criminal defendant is subject." 523 U.S. at 251 (Scalia, J., dissenting). The dissent further explained that "there is no rational basis" in tradition or in the Court's precedents "for making recidivism an exception" to the Sixth Amendment jury right. *Id.* at 258. These same criticisms continue to be echoed in this Court's subsequent decisions.

2. Legal developments since *Almendarez-Torres* have extended the ruling of *Apprendi* to a myriad of sentence-enhancing factors, isolating *Almendarez-Torres* as an inconsistent outlier. In particular, this Court has held that *Apprendi* is applicable to: facts that increase the defendant's mandatory minimum sentence, *see Alleyne*, 570 U.S. at 102; aggravating factors necessary to impose a death sentence, *Ring*,

536 U.S. at 589; *Hurst*, 577 U.S. at 94; facts necessary to impose criminal fines, *Southern Union Co. v. United States*, 567 U.S. 343, 346 (2012); state sentencing laws that increase imprisonment above the "standard range," *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *Cunningham v. California*, 549 U.S. 270, 274-75 (2007); and mandatory federal sentencing guidelines that increase the imprisonment range, *see United States v. Booker*, 543 U.S. 220, 226–27 (2005). And earlier this year, the Court ruled that *Apprendi* requires a jury to find that a defendant's prior convictions occurred on different occasions to enhance a sentence under the Armed Career Criminal Act. *See Erlinger v. United States*, 144 S. Ct. 1840, 1852, 1860 (2024). Against this backdrop of the Court's efforts to bring consistency to its Sixth Amendment jurisprudence under *Apprendi*, *Almendarez-Torres* stands alone, seemingly a baseless anomaly.

3. There are no reliance interests that warrant preserving *Almendarez-Torres*. Where, as here, "procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced." *Alleyne*, 570 U.S. at 119 (Sotomayor, Ginsburg, & Kagan, JJ., concurring) (citing *Gaudin*, 515 U.S. at 521; *Payne*, 501 U.S. at 828). The federal and state governments likewise have no significant reliance interests at issue because "prosecutors are perfectly able to 'charge facts upon which a [sentence enhancement] is based in the indictment and prove them to a jury.'" *Id.* (quoting *Harris*, 536 U.S. at 581, 122 S. Ct. 2406 (Thomas, J., dissenting)). Overruling *Almendarez-Torres* would treat the fact of a defendant's prior conviction the same as any other

factor the government must prove to the jury to seek an enhanced sentence under *Apprendi*.

4. As this Court observed earlier this year, "[t]he principles *Apprendi* and *Alleyne* discussed are so firmly entrenched that [this Court has] now overruled several decisions inconsistent with them." *Erlinger*, 144 S. Ct. at 1851 (collecting cases). Even Justices who dissented in *Apprendi* have concurred in overruling precedents that deviated from its ruling. *See Alleyne*, 570 U.S. at 124 (Breyer, J., concurring in part and concurring in the judgment) ("While *Harris* has been the law for 11 years, *Apprendi* has been the law for even longer; and I think the time has come to end this anomaly in *Apprendi*'s application. Consequently, I vote to overrule *Harris*."); *Ring*, 536 U.S. at 613 (Kennedy, J., concurring) ("Though it is still my view that [*Apprendi*] was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way."). So too here, it is time for this Court to end the *Almendarez-Torres* exception to *Apprendi*.

### C. It Is Vitally Important for This Court to Overrule *Almendarez-Torres*, and This Case Presents a Good Vehicle to Do So.

The time for this Court to act is now. With *Almendarez-Torres* still on the books as an exception to *Apprendi*, countless defendants will be sentenced without the benefit of the full jury right guaranteed by the Constitution, and the lower courts and litigants will continue to grapple with the breadth of the *Almendarez-Torres* exception. The Court should take the opportunity presented by this appeal to take up this important constitutional issue.

1. Until *Almendarez Torres* is overruled, criminal defendants facing a sentencing enhancement based on the fact of a prior conviction will be denied the protection of demanding that fact be decided by a jury of their peers beyond a reasonable doubt, even if they have a basis for contesting that fact (as did Mr. Lee). The prejudice to those defendants is magnified given that other defendants who face sentencing enhancements based on other facts *do* enjoy the full constitutional jury right. This differential treatment is unjustifiable. It is critical for this Court to intervene. *See Rangel-Reyes*, 547 U.S. 1200 (Thomas, J., dissenting from denial of certiorari) ("The Court's duty to resolve this matter is particularly compelling, because we are the only court authorized to do so. . . . And until we do so, countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments . . . . There is no good reason to allow such a state of affairs to persist."); *Shepard v. United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in judgment) ("Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.").

2. Courts across the country have acknowledged the need for this Court to clarify the status of *Almendarez-Torres* given the extent to which it has been undermined by the Court's subsequent decisions. *See, e.g.*, *Caswell v. People*, 2023 CO 50, ¶ 94, 536 P.3d 323, 341 (Oct. 3, 2023) (Gabriel, J., dissenting) ("[T]he

Supreme Court's jurisprudence in the years since *Almendarez-Torres* was decided has resulted in some uncertainty in this area, not only in Colorado, but also in federal and state courts throughout the country. Accordingly, and with great respect, I would urge the Supreme Court—whether in this or another case—to clarify whether the prior conviction exception remains viable and, if so, whether it applies in cases like this one, in which the fact of a prior conviction elevates a misdemeanor to a felony."), *cert. denied sub nom. Caswell v. Colorado*, No. 23-831, 2024 WL 3259703 (U.S. July 2, 2024); *Garrus v. Sec'y of Pa. Dep't of Corr.*, 694 F.3d 394, 416 (3d Cir. 2012) ("It is no secret that *Almendarez-Torres* is one of the most tenuous precedents of the Supreme Court."); *United States v. Rodriguez-Garza*, 126 F. App'x 322, 324 (7th Cir. 2005) (observing that "subsequent cases have whittled away at *Almendarez-Torres* and questioned its continuing viability"); *United States v. Barrera*, 261 F. App'x 570, 571 (4th Cir. 2008) (noting "some uncertainty regarding the future viability of *Almendarez-Torres*"); *United States v. Deval*, 496 F.3d 64, 83 (1st Cir. 2007) (noting that this Court has cast doubt on *Almendarez-Torres*); *United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1093 (9th Cir. 2006) (same); *United States v. Santa*, 155 F. App'x 475, 478 (11th Cir. 2005) (same); *United States v. Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000) (same); *United States v. Estrada*, 428 F.3d 387 (2d Cir. 2005) (same).

3. Finally, this case provides an ideal vehicle for this Court to revisit and overrule *Almendarez-Torres*. Mr. Lee expressly raised and preserved below a challenge to *Almendarez-Torres*. *See* C.A. Br. 22-23.

And the prior conviction exception under *Almendarez-Torres* was dispositive to the Fourth Circuit's analysis.

On appeal below, the Fourth Circuit decided whether the district court's failure to submit to the jury the three elements of a "serious drug felony" under 21 U.S.C. § 802(57)—which facts are necessary to impose an enhanced sentence under 21 U.S.C. § 841(b)—was harmless error. And, consistent with *Legins*, the court answered this question by asking whether proof of the missing elements was both "overwhelming and uncontroverted." App.10a. The Fourth Circuit recognized that Mr. Lee had in fact challenged the government's evidence as to one of those elements—"the fact of his prior conviction." App.7a, 11a. This element was not "uncontroverted" as a result. But that was a fact "the judge may decide so long as *Almendarez-Torres* remains good law." App.11a. The fact that *Almendarez-Torres* "remains good law" (*id.*) thus made the difference between a reversible error and a harmless one.

* * *

Each term "criminal defendants file a flood of petitions specifically presenting this Court with opportunities to reconsider *Almendarez-Torres*," and "[i]t is time for this Court to do its part by granting one of those many petitions and overruling *Almendarez-Torres*." *Erlinger*, 144 S. Ct. at 1861 (Thomas, J., concurring) (internal quotation marks omitted). This case provides a good vehicle to do so, and the Court should not let yet another opportunity slip by to revisit and overrule *Almendarez-Torres*.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 27, 2024

# APPENDIX

## TABLE OF APPENDICES

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DATED APRIL 30, 2024**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4299

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

AUSTIN KYLE LEE, A/K/A JUSTIN,

*Defendant-Appellant.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Louise W. Flanagan, District Judge. (7:18-cr-00153-FL-1)

Argued May 5, 2023 Decided April 30, 2024

Before RUSHING and BENJAMIN, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge Benjamin and Senior Judge Keenan joined.

*Appendix A*

RUSHING, Circuit Judge:

A jury found Austin Kyle Lee guilty of numerous federal drug and firearm offenses. A judge found additional facts that increased Lee's mandatory minimum sentence for those crimes. On appeal, Lee argues that this judicial factfinding violated his Sixth Amendment right to a jury trial. The Government agrees but contends that the district court's procedural error was harmless because proof of the relevant facts was overwhelming and uncontroverted. Because any error was harmless, we affirm the district court's judgment.

## I.

After serving more than four years in a New York prison for selling cocaine, Lee was released in late 2015. He moved to North Carolina and resumed selling drugs. A search of his residences ultimately revealed distribution quantities of a fentanyl—heroin mixture, cocaine, and marijuana; handguns and ammunition; packaging material; and over $200,000 in cash.

A federal grand jury returned a superseding indictment charging Lee with conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin, five kilograms or more of cocaine, and a quantity of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count One); three counts of distributing heroin between October 2016 and February 2018, in violation of 21 U.S.C. § 841(a)(1) (Counts Two through Four); possession with intent to distribute 100 grams or more of heroin and

quantities of marijuana and cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count Five); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Six); and possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924 (Count Seven). In connection with Counts One and Five, the indictment further alleged that Lee had a prior conviction for a "serious drug felony" for which he served more than twelve months' imprisonment, from which he was released within fifteen years of commencing the instant offenses. J.A. 38-40. If proven, Lee's prior serious drug felony conviction would trigger a higher statutory sentencing range pursuant to 21 U.S.C. § 841(b)(1)(A) and (B). Lee's appeal exclusively challenges the procedure the district court used to determine whether the serious drug felony enhancement applied.[1]

**A.**

Section 841(b)(1)(A) and (B) each increase the applicable mandatory minimum sentence when a defendant commits certain drug crimes "after a prior conviction for a serious drug felony . . . has become final."[2] 21 U.S.C.

1. Lee also submitted a motion to file a pro se supplemental brief raising other issues. Because Lee is represented by counsel who has filed a merits brief, he is not entitled to file a pro se supplemental brief. *See United States v. Penniegraft*, 641 F.3d 566, 569 n.1 (4th Cir. 2011). Accordingly, we deny his motion.

2. Before the First Step Act of 2018, this enhancement hinged on whether the defendant had a prior conviction for a "felony drug offense," which meant a drug crime punishable by more than a year in prison. 21 U.S.C. § 802(44); First Step Act of 2018, Pub. L. No.

§ 841(b)(1)(A), (B). A "serious drug felony" is (1) "an offense described in section 924(e)(2) of Title 18" for which the defendant (2) "served a term of imprisonment of more than 12 months" and (3) was released "within 15 years of the commencement of the instant offense." 21 U.S.C. § 802(57). Section 924(e)(2) includes, as relevant here, "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . , for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The serious drug felony enhancement increases the mandatory minimum sentence for a Section 841(b)(1)(A) offense like Count One from 10 years to 15 years and, for a Section 841(b)(1)(B) offense like Count Five, increases the sentencing range from 5 to 40 years to 10 years to life.

Another statutory provision, Section 851, sets forth the procedure for determining whether a prior conviction triggers the sentencing enhancement. *See* 21 U.S.C. § 851. Section 851 requires the Government, before trial or a guilty plea, to file a notice identifying the prior conviction on which it relies for the enhancement. *Id.* § 851(a)(1). "[A]fter conviction but before pronouncement of [the] sentence," the district court must inquire whether the defendant "affirms or denies that he has been previously convicted" as the notice alleges. *Id.* § 851(b). If the defendant denies any allegation in the notice or claims

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115-391, § 401(a)(2), 132 Stat. 5194, 5220-5221 (2018). The First Step Act narrowed the enhancement by substituting "serious drug felony or serious violent felony" in place of "felony drug offense." § 401(a)(2), 132 Stat. at 5220-5221.

the prior conviction is invalid, he files a written response. *Id.* § 851(c)(1). The district court then must conduct an evidentiary hearing "to determine any issues raised by the response which would except the person from increased punishment," and that hearing "shall be before the court without a jury." *Id.* The Government has "the burden of proof beyond a reasonable doubt on any issue of fact," save for challenges to the constitutionality of the prior conviction. *Id.* § 851(c)(1)-(2). After the hearing, "the court determines" whether the defendant "is subject to increased punishment by reason of [the] prior conviction[]" and "shall enter findings of fact and conclusions of law" at the request of either party. *Id.* § 851(c)(1), (d)(1).

**B.**

In accordance with Section 851, the Government filed a notice of its intent to seek an increased penalty based on Lee's prior conviction for a serious drug felony, namely, his conviction for selling cocaine in violation of New York Penal Law § 220.41. It included a certificate of disposition from the New York Supreme Court confirming Lee's conviction and sentence as well as a certificate of incarceration from the New York State Department of Corrections and Community Supervision specifying the dates of Lee's incarceration and release. The Government also submitted documents demonstrating that, with Lee's criminal history, his New York offense carried a maximum sentence of at least ten years.

Both Lee and the Government contended that it was for the jury—not the judge—to decide the facts necessary

to establish the serious drug felony enhancement. In particular, they asserted that the jury must decide whether Lee had served more than 12 months in prison for the New York offense and whether he was released within 15 years of commencing the federal offenses. The district court disagreed and rejected the parties' proposed jury questions about the serious drug felony elements. In the court's view, Section 851 assigned responsibility for finding all facts necessary to impose the serious drug felony enhancement exclusively to the judge, not the jury, and that assignment did not run afoul of Lee's constitutional right to a jury trial. *See United States v. Lee*, No. 7:18-CR-153-FL-1, 2021 U.S. Dist. LEXIS 29864, 2021 WL 640028 (E.D.N.C. Feb. 18, 2021).

Although the jury was not asked to decide the duration or recency of Lee's imprisonment for the New York drug offense, related evidence was introduced at trial as part of proving his felon status for purposes of the firearm charge. For example, the Government introduced as Exhibit 83 a certified copy of Lee's New York indictment and certificate of disposition showing that he was convicted in 2011 of criminal sale of a controlled substance and sentenced to six years in prison. Exhibit 84 was the New York certificate of incarceration showing that Lee was incarcerated from January 10, 2011, to December 23, 2015, when he was conditionally released on parole. Lee's North Carolina probation officer testified that she began supervising him in December 2015 when he was released from prison and his supervision was transferred from New York. And Lee himself testified that he was released from prison in New York at the end of 2015, after serving "about five years" for selling cocaine. J.A. 749.

The jury convicted Lee on all counts, and the district court scheduled a Section 851 hearing. Before the hearing, Lee filed a pro se submission (despite being represented by counsel) claiming that his New York conviction had been vacated based on a motion he filed in state court in July 2020. At the hearing, Lee's counsel "persist[ed] in" that position but did not "have any documentation to show that the judgment was vacated." J.A. 984-985. The Government presented argument on each element of the serious drug felony enhancement, relying on evidence presented at trial and noting that the New York certificate of disposition was certified by the clerk of court in January 2021.

The district court found the Government had proved beyond a reasonable doubt that Lee had a prior conviction for a serious drug felony. *See United States v. Lee*, No. 7:18-CR-153-FL-1, 2021 U.S. Dist. LEXIS 54395, 2021 WL 1108586 (E.D.N.C. Mar. 23, 2021). First, the court determined that Lee's New York conviction qualified as an offense "described in section 924(e)(2)," 21 U.S.C. § 802(57), because it involved distributing a controlled substance and the maximum term of imprisonment was ten or more years. The court rejected Lee's "bare assertion" that his conviction had been vacated because he offered "no evidence" to support it and the Government's evidence showed the New York court certified his conviction as of January 2021. *Lee*, 2021 U.S. Dist. LEXIS 54395, 2021 WL 1108586, at *4. Second, the district court found that Lee served "more than four years" in prison for the offense, well exceeding the twelve-month threshold for a serious drug felony. *Id.* at *3. Third, the court found that Lee was released from prison on the New York offense "within 15 years of the commencement of the instant offense," in fact

"within one year at the earliest and three years at the latest." *Id.* As a result, the court concluded that Lee was subject to the statutorily mandated increased punishment for Count One, under Section 841(b)(1)(A), and for Count Five, under Section 841(b)(1)(B).

The district court sentenced Lee to 340 months' imprisonment—280 months on Counts One through Five to be served concurrently, 120 months served concurrently for Count Seven, and 60 months served consecutively for Count Six—all to be followed by ten years' supervised release. Lee timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.

**II.**

The Sixth Amendment to the United States Constitution entitles a person accused of a crime to a trial by jury. U.S. Const. amend. VI. "'[F]acts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime," and thus, the Sixth Amendment guarantees defendants "the right to have a jury find those facts beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 111, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). This includes facts that increase the statutory maximum or the mandatory minimum. *Id.* at 111-112. The Supreme Court has recognized one "narrow exception" to this rule: a judge may find "the fact of a prior conviction" even when that finding increases a defendant's statutory sentencing exposure. *Id.* at 111 n.1 (citing *Almendarez-*

*Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)); *Apprendi*, 530 U.S. at 490 (same); *see also Mathis v. United States*, 579 U.S. 500, 511, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016) ("[O]nly a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction.").

The district court concluded that the serious drug felony determination fell within this exception for the fact of a prior conviction. *See Lee*, 2021 U.S. Dist. LEXIS 29864, 2021 WL 640028, at *4 (citing *Almendarez-Torres*, 523 U.S. at 230). Lee disagrees. He argues that the serious drug felony enhancement required proof of three facts. *See* 21 U.S.C. § 802(57). The first—that he had a prior conviction for an offense described in Section 924(e)(2)—could be found by the judge without a jury consistent with *Almendarez-Torres* . But the other two facts—that he served more than 12 months in prison and was released within 15 years of the commencement of the instant offenses—must be found by a jury because they are not encompassed within the fact of the prior conviction. The duration and recency of his imprisonment, Lee argues, were not "necessarily established" by his prior conviction or found by a prior jury. *United States v. Dean*, 604 F.3d 169, 172 (4th Cir. 2010) (internal quotation marks omitted). Far from "inher[ing] in the fact of [his] conviction," *United States v. Thompson*, 421 F.3d 278, 283 (4th Cir. 2005), these facts can only be determined by events occurring *since* that conviction. *See United States v. Fields*, 53 F.4th 1027, 1037-1038 (6th Cir. 2022) (finding this argument "persuasive" but declining to "definitively decide this constitutional issue" because the district court

in that case submitted the duration and recency questions to the jury).

The Government agrees with Lee's argument this far but observes that the constitutional error—like most trial errors—is subject to harmless error review. *See Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Under that standard, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). When a district court fails to submit a sentencing factor to the jury, we will disregard the error only if "proof of the missing element is 'overwhelming' and 'uncontroverted.'" *United States v. Legins*, 34 F.4th 304, 322 (4th Cir.), *cert. denied*, 143 S. Ct. 266, 214 L. Ed. 2d 115 (2022) (quoting *Neder*, 527 U.S. at 17-18); *see also United States v. Catone*, 769 F.3d 866, 874 (4th Cir. 2014) ("An *Apprendi* error is harmless 'where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.'" (quoting *Neder*, 527 U.S. at 17)). The Government says that standard is satisfied here.

We agree with the Government. Assuming, without deciding, that the district court erred by deciding for itself the duration and recency of Lee's prior incarceration as necessary to establish the serious drug felony enhancement, rather than submitting those questions to the jury, that error was harmless. Both elements were "uncontested and supported by overwhelming evidence."

*Neder*, 527 U.S. at 17. Regarding duration, Lee did not contest at the Section 851 hearing, and does not contest on appeal, that he served more than 12 months in prison for his prior offense. Exhibit 84 reflects that he was incarcerated for over four years, and Lee himself testified at trial that he served "about five years" in prison. J.A. 749. As for recency, Lee again did not and does not dispute that the instant offenses commenced within 15 years of his release from prison. The conspiracy and possession crimes of Counts One and Five began in 2018 at the latest. Exhibit 84 shows that Lee was released from prison in December 2015, and at trial he and his parole officer both testified that he was released in late 2015. It is therefore "clear beyond a reasonable doubt that a rational jury would have found [Lee] guilty" had these two elements been submitted to it. *Neder*, 527 U.S. at 18; *see Legins*, 34 F.4th at 324.

Lee counters that he *did* contest the Government's proof by asserting at the Section 851 hearing that his prior conviction had been vacated. But Lee's vacatur argument addresses the fact of his prior conviction, a fact that he concedes the judge may decide so long as *Almendarez-Torres* remains good law. It has no bearing on the duration and recency questions he claims were erroneously withdrawn from the jury.

**III.**

Any procedural error in the district court's determination that the serious drug felony enhancement applied to increase Lee's statutory sentencing range was harmless. Lee concedes that, under existing law, the judge

could decide the fact of his prior conviction without a jury. And the Government's proof of the other two elements—concerning the duration and recency of his incarceration for that offense—was overwhelming and uncontroverted. The judgment of the district court is

*AFFIRMED.*

## APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SOUTHERN DIVISION, DATED FEBRUARY 18, 2021

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SOUTHERN DIVISION

NO. 7:18-CR-153-FL-1

UNITED STATES OF AMERICA

v.

AUSTIN KYLE LEE, A/K/A "JUSTIN",

*Defendant.*

Signed February 18, 2021

LOUISE W. FLANAGAN, United States District Judge

### MEMORANDUM OPINION

This matter came before the court for trial commencing February 3, 2021. The court memorializes herein reasons for not submitting special interrogatories to the jury related to the definition of a serious drug felony under 21 U.S.C. §§ 802(57) and 841(b)(1)(A), and not instructing the jury on related matters.

*Appendix B*

## BACKGROUND

To provide context for the court's analysis, the court summarizes the following procedural history. Superseding indictment, returned December 11, 2019, charged defendant with the following offenses: conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin, a quantity of marijuana, and five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846 ("count one"); aiding and abetting distribution of a quantity of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; distribution of a quantity of heroin, in violation of 21 U.S.C. § 841(a)(1); possession with intent to distribute one hundred grams or more of a mixture or substance containing a detectable amount of heroin, a quantity of marijuana, and a quantity of cocaine, in violation of 21 U.S.C. § 841(a)(1) ("count five"); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). The indictment included, in reference to counts one and five, specific allegations of a prior "final conviction for a serious drug felony for which [defendant] served more than [12] months of imprisonment and from which he was released from serving any term of imprisonment related to that offense within [15] years of commencement of the instant offense." (Superseding Indictment (DE 91) at 1-3).

On January 20, 2021, the United States filed a notice of intent to seek enhanced penalty pursuant to 21 U.S.C. § 851, advising defendant and the court that defendant was eligible for enhanced punishment under

21 U.S.C. § 841(b)(1)(A) due to his prior conviction for a serious drug felony. (Notice (DE 152)). This was joined by the government's proposed jury instructions, which requested the jury be instructed that "[w]hen you have completed your initial deliberations there are additional matters for you to consider regarding [count one/count five] of the Superseding Indictment, should you have determined that Defendant is guilty of [count one/count five]."[1] (Government's Proposed Jury Instructions (DE 155) at 53, 64). The additional matters were to be that "the offense[s] charged in [count one/count five] [are] more serious if, before committing the offense, the defendant was convicted of the crime [the court] describe[s] below, and served more than 12 months in prison for that crime, and was released from prison within 15 years before commencement of the offense charged here in [count one/count five]." (*Id.*). The government proposed that the jury would then be asked three questions:

> 1. Do you unanimously agree, by proof beyond a reasonable doubt, that before defendant . . . committed the offense charged in [count one/count five], he was convicted of the crime of Criminal Sale of a Controlled Substance in the Second Degree under New York law? I instruct you as a matter of law that this offense is a serious drug felony.

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1. In its trial brief filed the same date, the government suggested that evidence regarding the § 841(b)(1)(A) sentencing enhancement be submitted to the jury as part of its case in chief. (*See* Trial Br. (DE 151) at 23-24 ("Bifurcation of § 851 Evidence Unnecessary")).

> 2. If so, do you unanimously agree, by proof beyond a reasonable doubt, that he served more than 12 months in prison for that crime?
>
> 3. If so, do you unanimously agree, by proof beyond a reasonable doubt, that he was released from serving any term of imprisonment for that crime within 15 years of the commencement of the offense charged in [count one/count five]?

(*Id.* at 53-54, 64-65). The government's proposed verdict form included corresponding questions for the jury. (Government's Proposed Verdict Form (DE 161) at 3, 5). Defendant did not propose jury instructions on this topic, but defendant requested that the issues be presented to the jury in a bifurcated proceeding in the event of guilty verdict on counts one and five.

The court addressed the government's proposed jury instructions regarding the sentencing enhancement for counts one and five at several conferences with the parties on the first, second, and third days of trial. [2] When the court inquired as to the government's basis for its proposed instructions, the government initially asserted that the length of the prior sentences and release date must be proven to the jury under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its progeny. The government asserted that the First Step

2. A separate question of what evidence the jury should and did hear regarding the 18 U.S.C. § 922(g)(1) felon-in-possession charge was treated independently by the court, and not subject of the instant memorandum opinion.

Act of 2018 changed the nature of what 21 U.S.C. § 851 requires and "amended" that section. The government represented that it was the position of the Department of Justice that any disputed issues with satisfaction of the components of the definition of a serious drug felony in 21 U.S.C. § 802(57)(A) and (B), which were added by the First Step Act, must be submitted to a jury.

Upon further inquiry as to whether any court had endorsed the position of the government, the government suggested it could obtain court records from the United States District Court for the Eastern District of Pennsylvania where the jury was asked, and answered, questions regarding the definition of a serious drug felony, under 21 U.S.C. § 802(57), as it relates to enhanced sentences. That evening, the government informally transmitted to the clerk for the court's review examples of the mentioned dockets in the Eastern District of Pennsylvania as well as the transcript from one of the cases. At conference with the parties on the third day of trial, the government reconfirmed its position that the definition components of a serious drug felony, under 21 U.S.C. § 802(57), must be presented to a jury in a bifurcated proceeding, in the event the jury returns a verdict of guilty on counts one and five.[3] Defendant also requested that the issue be so presented to the jury, although neither party offered further authority in support of this approach.

3. The government confirmed, however, that it had abandoned its proposal initially advanced in its trial brief to present this issue to the jury in its case in chief, consistent with defendant's request to present the issue to the jury only in a bifurcated proceeding in the event of a guilty verdict on counts one and five.

After hearing the parties' respective positions, the court decided that the issue would not go to the jury, and the court gave a preliminary explanation to defendant of how the § 851 process would proceed in the event of a guilty verdict on counts one or five.

Thereafter, upon instructing the jury before deliberations, the court did not include the government's requested instruction to the jury nor the requested special interrogatories on the verdict form submitted to the jury. *(See* Jury Instructions (DE 190); Jury Verdict (DE 193)). The jury found defendant guilty on all counts, including charges one and five eligible for enhanced punishment. Following guilty verdict, the court notified defendant that it would set a deadline for a written response to the allegation of prior conviction, pursuant to § 851(c)(1), and would enter a written order with further details on the § 851 proceedings. As memorialized by the court's order on February 12, 2021: sentencing is set to take place during the July 13, 2021, term of court; defendant is on notice of his opportunity to affirm or deny the allegation of the prior conviction set forth in the government's § 851 notice; written response, if any, denying the allegation of prior conviction is due by March 5, 2021; and hearing on issues raised therein, if necessary, is set for March 11, 2021.

**COURT'S DISCUSSION**

21 U.S.C. § 841 prohibits the knowing or intentional manufacture, distribution, or dispensation of a controlled substance and possession with intent to manufacture,

distribute, or dispense a controlled substance. 21 U.S.C. § 841(a)(1). Section 841 provides for a sentencing enhancement in the case of a violation involving, as relevant here, five kilograms or more of cocaine or one kilogram or more of a mixture or substance containing a detectable amount of heroin, "[i]f any person commits such a violation after a prior conviction for a serious drug felony." *Id.* § 841(b)(1)(A). If the requirements for the enhancement are met, "such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment." *Id.*

The statute defines a "serious drug felony" as "an offense described in section 924(e)(2) of Title 18 for which . . . the offender served a term of imprisonment for more than 12 months; and . . . the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense." 21 U.S.C. § 802(57) (hereinafter, the "definitional components").[4] Section 924(e)(2) describes, as relevant here, a serious drug offense as being an "offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" as defined by the statute "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

Section 851 sets forth procedures to establish prior convictions for the purpose of increased punishment under the statute. *See* 21 U.S.C. § 851. The section

4. Two paragraph 57s have been enacted. *See* 21 U.S.C.A. § 802(57) n.1 (West). The court's citation throughout references the paragraph defining a serious drug felony.

requires a notice, or an "information,"[5] to be filed by the government prior to trial or entry of a guilty plea that "stat[es] in writing the previous convictions to be relied upon." *Id.* § 851(a)(1). If such notice is given, the court is required "after conviction but before pronouncement of sentence [to] inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information" and to "inform [defendant] that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." *Id.* § 851(b).

If a defendant "denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid," he or she is required to "file a written response to the information." *Id.* § 851(c)(1). Likewise, if a defendant claims that "a conviction alleged in the information was obtained in violation of the [U.S.] Constitution," the defendant "shall set forth his claim, and the factual basis therefor, with particularity" in the response. *Id.* § 851(c)(2). Failure to file a response, in effect, constitutes affirmation of the sentencing enhancement based on the prior conviction alleged in the information. *See id.* § 851(b), (c)(2), (d)(1) ("If the person files no response to the information, . . . the court shall proceed to impose sentence upon him as provided by this part.").

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5. "[A]lthough § 851(a) requires that the government file 'an information,' the document is often referred to as a 'notice.'" *United States v. Clarke*, 237 F. App'x 831, 833 (4th Cir. 2007) (citing *United States v. LaBonte*, 520 U.S. 751, 754 n.1, 117 S. Ct. 1673, 137 L. Ed. 2d 1001 (1997)).

In the event defendant files a response, the court must "hold a hearing to determine any issues raised by the response which would except the person from increased punishment," and that "hearing shall be before the court without a jury and either party may introduce evidence." *Id.* § 851(c)(1). The government has "the burden of proof beyond a reasonable doubt on any issue of fact," except for challenges to convictions on the basis that they were "obtained in violation of the Constitution of the United States" in which case the defendant has "the burden of proof by a preponderance of the evidence on any issue of fact raised" in his or her response to the information. *Id.* § 851(c)(2).

The foregoing statutory "procedure provides [a] defendant with a full and fair opportunity to establish that he is not the previously convicted individual or that the conviction is an inappropriate basis for enhancement under section 841." *United States v. Campbell*, 980 F.2d 245, 252 (4th Cir. 1992). One purpose of § 851 is to give "defendant an opportunity to challenge the use of the prior convictions and to prevent sentencing errors." *United States v. Beasley*, 495 F.3d 142, 149 (4th Cir. 2007); *see also United States v. Rodriguez*, 851 F.3d 931, 946 (9th Cir. 2017) ("The § 851(b) colloquy is not merely a procedural requirement. It serves a functional purpose 'to place the procedural onus on the district court to ensure defendants are fully aware of their rights.' (quoting *United States v. Espinal*, 634 F.3d 655, 665 (2d Cir. 2011))).

"Because § 851 permits judicial factfinding on a defendant's prior convictions, it falls within [*Apprendi*'s]

prior conviction exception." *United States v. Smith*, 451 F.3d 209, 224 (4th Cir. 2006); *see Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); *see also Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (holding that *Apprendi* applies to facts increasing statutory mandatory minimum). The exception for the fact of a prior conviction is based in the recognition that "recidivism does not relate to the commission of the offense." *Apprendi*, 530 U.S. at 488 (quotations omitted). Accordingly, no jury determination is required where a sentencing enhancement is based upon "the prior commission of a serious crime." *Almendarez—Torres v. United States*, 523 U.S. 224, 230, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *see also Jones v. United States*, 526 U.S. 227, 248, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) ("[T]he precise holding [in *Almendarez—Torres]* that recidivism increasing the maximum penalty need not be so charged . . . rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment.").

In sum, § 851 requires the court to decide whether defendant has a prior conviction of a serious drug felony, including any necessary definitional components of such a prior conviction. As noted above, the parties nonetheless have taken the position that the definitional components of a serious drug felony set forth in § 802(57) must be presented to and decided by a jury. In essence, the parties suggest that these definitional components comprise

something other than the "fact of a prior conviction," and thus must be decided by a jury. The parties' suggestion, however, is flawed in several respects.

First, the parties' suggestion is contrary to the plain language of §§ 841 and 851. In particular, section 841 provides a sentencing enhancement if a defendant commits a violation "after *a prior conviction* for *a serious drug felony.*" 21 U.S.C. § 841(b)(1)(A) (emphasis added). At the outset, the enhancement is premised solely on the fact of "a prior conviction." It is not dependent upon facts other than a prior conviction. The requirement that the prior conviction must meet certain definitional components does not alter its foundation based entirely in recidivism.

The plain text of § 851 further reinforces the potential breadth of the court's inquiry into the fact of "a prior conviction" in § 841. It allows the government to show "that *facts regarding prior convictions* could not with due diligence be obtained prior to trial." *Id.* § 851(a)(1) (emphasis added). It allows a defendant to deny "*any allegation* of the information of prior conviction," and it contemplates a hearing "to determine *any issues* raised by the response which would except the person from increased punishment." *Id.* § 851(c)(1) (emphasis added). It notes that the failure of the government to "include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon" shall not invalidate the government's notice. *Id.* Finally, it provides that "either party may introduce evidence," it imposes on the government the burden "on any issue of fact," and it allows the court to enter "findings of fact." *Id.*

Thus, these provisions make clear that the fact "of a prior conviction" encompasses a variety of subsidiary findings necessary to define or qualify that prior conviction.

Second, nothing in the First Step Act, itself, calls for a drastic departure from established procedures as suggested by the parties in the instant case. In pertinent part, the First Step Act merely changes the substantive components of the definition of a qualifying prior conviction, without making any reference to the procedural requirements of § 851. Prior to the First Step Act, § 841's enhancement required a "prior conviction for a felony drug offense," defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." *See* 21 U.S.C. §§ 841(b)(1)(A), 802(44) (2016). Now, after the First Step Act, § 841 requires a "prior conviction for a serious drug felony," defined as an offense in 18 U.S.C. § 924(e) for which the "offender served a term of imprisonment of more than 12 months" and for which the offender was "release[d] from any term of imprisonment . . . within 15 years of the commencement of the instant offense." 21 U.S.C. § 802(57); *see* First Step of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194, 5520-21 (codified as amended at 21 U.S.C. §§ 802(57), 841(b)(1)).

The court declines to interpret Congress's narrowing of the substantive definition of a qualifying prior conviction in the First Step Act as obsoleting *sub silentio* § 851's enumerated procedures. *Cf. Watt v. Alaska*, 451 U.S.

259, 267, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981) ("[Courts] must read . . . statutes to give effect to each if [courts] can do so while preserving their sense and purpose."); *Waterfront Comm'n of N.Y. Harbor v. Elizabeth-Newark Shipping, Inc.*, 164 F.3d 177, 183 (3d Cir. 1998) ("[I]t is doubtful that the legislatures would have, by means of a supplementary definition[,] . . . undertaken, *sub silentio*, to render a separate definition in another section of the statute superfluous."). Instead, the court reads the First Step Act's additional factual restrictions on the requisite type of prior conviction for an enhanced sentence in conjunction with the procedures laid out in § 851, with *Apprendi*'s fact-of-conviction exception in mind.

Third, there is no case law precedent, published or unpublished, interpreting the First Step Act to require a change to § 851 procedures as suggested by the parties here. To the contrary, cases that have addressed the issue since enactment of the First Step Act have indicated that the court, not a jury, must determine whether the definitional components of § 802(57) have been met, under the established § 851 procedures. *See, e.g., United States v. Corona-Verduzco*, 963 F.3d 720, 724 (8th Cir. 2020) ("[W]hile the [First Step Act] reduced mandatory minimums, it did not amend the structure and procedure for the § 841(b)(1)(A) enhancements or the general purpose of the statute." (citing 21 U.S.C. §§ 802(13), 841(a), 851)); *United States v. Kendrick*, 825 F. App'x 77, 79-80 (3d Cir. 2020) (stating, post-First Step Act, *"Almendarez-Torres* is still good law"); *United States v. Chavez*, 804 F. App'x 525, 526 (9th Cir. 2020) (requiring adherence to § 851, post-First Step Act); *United States v. Johnson*, No. 17-CR-

00770, 2021 U.S. Dist. LEXIS 13628, 2021 WL 260226, at *1 (N.D. Ill. Jan. 26, 2021) (determining, following § 851 hearing, "that the Government had proved beyond a reasonable doubt the fact of conviction, that [defendant] had served more than 12 months' imprisonment for the conviction, and that he had been released from his term of imprisonment for the conviction within 15 years of the commencement of the offense").

The court recognizes that one district court, according to records informally referenced by the government in the instant case, has submitted questions regarding the definitional components of § 802(57) to a jury in bifurcated proceedings after enactment of the First Step Act. *See, e.g.*, Transcript of November 19, 2019, Proceedings at 3-9, *United States v. West*, No. 2:18-CR-249-MMB-2 (E.D. Pa. Dec. 19, 2019), ECF No. 541; Jury Verdict Form—Bifurcated Counts, *United States v. Clark*, No. 2:19-CR-15-GJP (E.D. Pa. Feb. 27, 2020), ECF No. 332 (only title available to public); Verdict, *United States v. Scales*, No. 2:18-CR-576-MAK (E.D. Pa. Dec. 6, 2020), ECF No. 263 (same). Records of those proceedings, however, do not reveal any argument on the issues covered in the instant memorandum opinion, nor any court opinion addressing the issues. Accordingly, the court finds that the present weight of authority after enactment of the First Step Act supports the approach adopted by the court herein.

Finally, courts interpreting § 851 and *Apprendi*, generally, recognize that the inquiry into the "fact of a prior conviction" may include antecedent findings and issues, requiring recourse to a limited set of evidence probative

to those findings and issues, without running afoul of the Sixth Amendment. In making this inquiry, courts cannot "sever the prior conviction from its essential components." *United States v. Thompson*, 421 F.3d 278, 282 (4th Cir. 2005). They cannot impose "an artificially narrow reading of the 'fact of a prior conviction' exception" that "extend[s] to only a grudging acknowledgment that a defendant once had been convicted." *Id.* Rather, "§ 851 permits judicial *factfinding on a defendant's prior convictions*" without violating a defendant's Sixth Amendment rights. *Smith*, 451 F.3d at 224 (emphasis added). Certain "'subsidiary findings' are part of 'the fact of prior conviction' which judges may find." *Thompson*, 421 F.3d at 284 n.4.

When "making factual findings *about a prior conviction,*" the court may look to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, *or some comparable judicial record.*" *United States v. Allen*, 446 F.3d 522, 531-32 (4th Cir. 2006) (emphasis added) (quotations omitted). Likewise, courts may consider "official documents establishing the matter with 'the conclusive significance of a prior judicial record.'" *United States v. Dean*, 604 F.3d 169, 173 (4th Cir. 2010) (quoting *Shepard v. United States*, 544 U.S. 13, 14, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)). Information from a document that "bears the earmarks of derivation from *Shepard*-approved sources" may be relied on. *Thompson*, 421 F.3d at 285 (holding that a presentence report can be used in armed career criminal determinations).

Moreover, the time actually served by a defendant for a prior conviction does not require qualitative analysis or speculation. *Compare Thompson*, 421 F.3d at 286 (explaining that the Armed Career Criminal Act's "use of the term 'occasion' requires recourse only to data normally found in conclusive judicial records, such as the date and location of an offense" as opposed to "a nebulous standard [that] cries out for speculation regarding facts extraneous to the prior conviction"), *with Descamps v. United States*, 570 U.S. 254, 269, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) (reversing circuit court and condemning its "reworking [that] authorize[d] the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct"); *and Mathis v. United States*, 136 S. Ct. 2243, 2252, 195 L. Ed. 2d 604 (2016) (explaining that, under the Sixth Amendment, district courts are "barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea' or 'what the jury in a prior trial must have accepted as the theory of the crime.'" (quoting *Shepard*, 544 U.S. at 24)).

In sum, neither the plain language of the applicable statutes nor case law interpreting them, require the court to submit the definitional components of a "serious drug felony" in § 802(57) to a jury.[6] The fact of defendant's

6. To the extent the parties suggest that the jury must also decide whether defendant was "convicted of the crime of Criminal Sale of a Controlled Substance in the Second Degree under New York law," (Government's Proposed Jury Instructions (DE 155) at 53-54, 64-65), their suggestion is foreclosed for all the aforementioned reasons that pertain to the definitional components of 21 U.S.C. § 802(57).

prior conviction, including satisfaction of any of its definitional components, must be determined by the court, if challenged by defendant, without a jury.

**CONCLUSION**

Based on the foregoing, the court rejected the parties' requests to instruct the jury on the definition of a serious drug felony under 21 U.S.C. §§ 802(57) and 841(b)(1)(A), and to present related special interrogatories for jury determination.

SO ORDERED, this the 18th day of February, 2021.

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, DATED JUNE 14, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Case Number: 7:18-CR-153-1FL
USM Number: 65363-056

UNITED STATES OF AMERICA

v.

AUSTIN KYLE LEE

Geoffrey Ryan Willis Defendant's Attorney

**JUDGMENT IN A CRIMINAL CASE**

**THE DEFENDANT:**

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) Counts 1s, 2s, 3s, 4s, 5s, 6s, and 7s after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

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| **Title & Section** | **Nature of Offense** | **Offense Ended** | **Count** |
|---|---|---|---|
| 21 U.S.C. §846, | Conspiracy to Distribute and Possess With Intent to Distribute 1 Kilogram | 2/2/2018 | 1s |
| 21 U.S.C. §841(b)(1)(A), and | or More of a Mixture or Substance Containing a Detectable Amount of | | |
| 21 U.S.C. §851 | Heroin, a Quantity of Marijuana, and 5 Kilograms or More of Cocaine | | |

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s)_____
☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments

imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/14/2021
Date of Imposition of Judgment

/s/ Louise W. Flanagan
Signature of Judge

Louise W. Flanagan, U.S. District Judge
Name and Title of Judge

6/14/2021
Date

**ADDITIONAL COUNTS OF CONVICTION**

| **Title & Section** | **Nature of Offense** | **Offense Ended** | **Count** |
|---|---|---|---|
| 21 U.S.C. §841(a)(1), 21 U.S.C. §841(b)(1)(C), 18 U.S.C. §2 and 21 U.S.C. §851 | Distribution of a Quantity of Heroin and Aiding and Abetting | 10/28/2016 | 2s |

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| | | | |
|---|---|---|---|
| 21 U.S.C. §841(a)(1), 21 U.S.C. §841(b)(1)(C), 18 U.S.C. §2 and 21 U.S.C. §851 | Distribution of a Quantity of Heroin and Aiding and Abetting | 8/9/2017 | 3s |
| 21 U.S.C. §841(a)(1), 21 U.S.C. §841(b)(1)(C), and 21 U.S.C. §851 | Distribution of a Quantity of Heroin | 2/1/2018 | 4s |
| 21 U.S.C. §841(a)(1), 21 U.S.C. §841(b)(1)(B), and | Possession With Intent to Distribute 100 Grams or More of a Substance Containing a Detectable Amount of Heroin, a Quantity of | 2/2/2018 | 5s |

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| | | | |
|---|---|---|---|
| 21 U.S.C. §851 | Marijuana, and a Quantity of Cocaine | | |
| 18 U.S.C. §924(c)(1)(A), 18 U.S.C. §924(c)(1)(A)(i) | Possession of Firearms in Furtherance of a Drug Trafficking Crime | 2/2/2018 | 6s |
| 18 U.S.C. §922(g)(1), 18 U.S.C. §924(a)(2) | Possession of Firearms by a Convicted Felon | 2/2/2018 | 7s |

**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

280 months on each of Counts 1s, 2s, 3s, 4s, and 5s, concurrent, a term of 60 months on Count 6s, to be served consecutively to Counts 1s, 2s, 3s, 4s, and 5s, and a term of 120 months concurrent on Count 7s, producing a total term of 340 months

☒ The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant receive vocational training and educational opportunities. The court recommends defendant receive a mental health assessment and mental health treatment while incarcerated.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

*Appendix C*

**RETURN**

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

**SUPERVISED RELEASE**

Upon release from impisonment, you will be on supervised release for a term of:

10 Years on Count 1s, 6 years on Counts 2s, 3s, and 4s, 8 years on Count 5s, and 3 years on Counts 6s and 7s, all such terms to run concurrently, producing a total term of 10 years

**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a stu-dent, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

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**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

**SPECIAL CONDITIONS OF SUPERVISION**

The defendant shall consent to a warrantless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant shall participate in a vocational training program as directed by the probation officer.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

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## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Restitution | Fine | AVAA Assessment* | JVTA Assessment** |
|---|---|---|---|---|---|
| **TOTALS** | $ 700.00 | $ 0.00 | $ 15,000.00 | $ 0.00 | $ 0.00 |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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| Name of Payee | Total Loss*** | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| **TOTALS** | $ 0.00 | $ 0.00 | |

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

**A** ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below, or

**B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

**C** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

**D** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

**E** ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

**F** ☒ Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of $700.00 and fine in the amount of $15,000.00 are due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and Co-Defendant Names
*(including defendant number)*

| Total Amount | Joint and Several Amount | Corresponding Payee, if appropriate |
|---|---|---|

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Pursuant to the Order of Forfeiture entered on June 14, 2021.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

**DENIAL OF FEDERAL BENEFITS**
***(For Offenses Committed On or After November 18, 1988)***

**FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862(a)**

IT IS ORDERED that the defendant shall be:

☐ ineligible for all federal benefits for a period of _____.

☐ ineligible for the following federal benefits for a period of _____ . *(specify benefit(s))*

**OR**

☒ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

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**FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)**

IT IS ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of _____ .

☐ be ineligible for the following federal benefits for a period of _____ .
*(specify benefit(s))*

☐ successfully complete a drug testing and treatment program.

☐ perform community service, as specified in the probation and supervised release portion of this judgment.

☐ Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

**Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, Veterans benefit, public housing, or other similar benefit, or any other**

**benefit for which payments or services are required for eligibility. The clerk of court is responsible for sending a copy of this page and the first page of this judgment to:**

**U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531**

## APPENDIX D — STATUTES AND PROVISIONS

### U.S.C.A. Const. Amend. VI-Jury Trials

### Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

****

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**21 U.S.C.A. § 802**

**§ 802. Definitions**

Effective: December 2, 2022

***

**(57)**[1] The term "serious drug felony" means an offense described in section 924(e)(2) of Title 18 for which--

**(A)** the offender served a term of imprisonment of more than 12 months; and

**(B)** the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

****

1. So in original. Two pars. (57) have been enacted.

*Appendix D*

**21 U.S.C.A. § 841**

## § 841. Prohibited acts A

Effective: December 2, 2022

### (a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

**(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

**(2)** to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

### (b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

**(1)(A)** In the case of a violation of subsection (a) of this section involving--

**(i)** 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

**(ii)** 5 kilograms or more of a mixture or substance containing a detectable amount of--

**(I)** coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

**(II)** cocaine, its salts, optical and geometric isomers, and salts of isomers;

**(III)** ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

**(IV)** any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

**(iii)** 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

**(iv)** 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

**(v)** 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

**(vi)** 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

**(vii)** 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

**(viii)** 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and

not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

**(B)** In the case of a violation of subsection (a) of this section involving--

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**(i)** 100 grams or more of a mixture or substance containing a detectable amount of heroin;

**(ii)** 500 grams or more of a mixture or substance containing a detectable amount of--

> **(I)** coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
>
> **(II)** cocaine, its salts, optical and geometric isomers, and salts of isomers;
>
> **(III)** ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
>
> **(IV)** any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

**(iii)** 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

**(iv)** 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

**(v)** 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

**(vi)** 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

**(vii)** 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

**(viii)** 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from

the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

****

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## 21 U.S.C.A. § 846

### § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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## 21 U.S.C.A. § 851

### § 851. Proceedings to establish prior convictions

**(a) Information filed by United States Attorney**

**(1)** No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

***

**(b) Affirmation or denial of previous conviction**

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that

any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

**(c) Denial; written response; hearing**

**(1)** If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

***

**(d) Imposition of sentence**

**(1)** If the person files no response to the information, or if the court determines, after hearing, that the person

is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

****

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## TITLE IV—SENTENCING REFORM

### SEC. 401. REDUCE AND RESTRICT ENHANCED SENTENCING FOR PRIOR DRUG FELONIES.

(a) CONTROLLED SUBSTANCES ACT AMENDMENTS.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(1) in section 102 (21 U.S.C. 802), by adding at the end the following:

**<< 21 USCA § 802 >>**

"(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which—

"(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

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**<< 21 USCA § 802 >>**

***

(2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—

(A) in subparagraph (A), in the matter following clause (viii)—

**<< 21 USCA § 841 >>**

(i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

****

**<< 21 USCA § 841 >>**

(B) in subparagraph (B), in the matter following clause (viii), by striking "If any person commits ***5221** such a violation after a prior conviction for a felony drug offense has become final" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final".

****